(1)

03-1657

No:

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

Andrew Bestor

Petitioner

v.

Joseph Lieberman et al.

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the District of Columbia

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UNIFIED SUPPLEMENTAL BRIEF / REPLY BRIEF

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1. On the propriety of hearing the reassignment matter, two authorities and their progeny stand out: *Republic Natural Gas Co. v. Oklahoma* 344 U.S. 62, 68 S.Ct. 972, 92 L. ed. 1212 (1948) – No self-enforcing formula defining when a judgment is "final" can be devised (92 L. ed. 1219) - and *Cohen v. Beneficial Industrial Loan Corp* 337 U.S. 541, 69 S.Ct. 1221, 93 L.ed. 1528 (1949) – Thus a "practical rather than a technical construction" standard has been adapted for the purpose of identifying those judgments which are final and which are not (cited in *District of Columbia v. Tschudin*, D.C. App., 390 A.2d at 988). In the District of Columbia:

> In determining final order, pertinent needs of judicial process must also be considered, and expense and delay of piecemeal litigation must be balanced with need for just adjudication of individual rights. *Dameron v. Capital House Associates LTD* 431 A.2d 580 citing back to *Republic* at 586.
>
> In determining finality of order or judgment for purposes of appeal, court takes into consideration "not merely those interests of the immediate parties but, more particularly, those interests which pertain to the smooth functioning of the judicial system." D.C.C.E. 11-721(a)(1). Cited in *Trilon Plaza Co. v. Allstate Leasing Corporation* 399 A.2d 34, originating in *District of Columbia v. Tschudin*, D.C. App., 390 A.2d 986, 988 (1978), quoting *Republic* 1220.
>
> On which side of the line, however faint and faltering at times, dividing judgments that were deemed "final" from those not found to be so, does the judgment before us fall. *Republic* 92 L. ed. 1220.

From *Trilon P' za*; The principals underlying these decisions have been succinctly stated by the Supreme Court in a decision construing Title 28 U.S.C. 1291 which provides for appeal "from all final decisions of the district courts":

> The effect of the statute is to disallow appeal from any decision which is tentative, informal, or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal.
> *Cohen at 1536 cited in Trilon Plaza, which continues:*
> Nor does the statute permit appeals [from orders] where they are but steps toward final judgments **in which they will merge** (Bestor emphasis).

This is exactly the point of Bestor's second question, claiming the issues between Bestor and the judge [literally, the threatened reassignment] are hugely disparate from the issues between Bestor and the defendants. THEY NEVER MERGE. The only way the issues would possibly merge is in a 372(c) action, or in some scenario where this Court forced pro se litigants to caption the judge in 42:1986 litigation as a device to avert a particular jurist, but Bestor claims both those possibilities are hugely diminishing to pro se litigants generally.

Frankfurter wrote *Republic* [natural gas, Oklahoma], and at 92 L. ed. 1221 discusses the many excellent reasons, issues, or factors to be considered in **avoiding** fragmentary review of that case – eminent domain case, rate fixing case, and condemnation devices among them. The matter at hand has none of that complexity. Zero. **The practical rather than technical construction standard has been adapted.**

Petitioner's Reply Brief

1. On discovering the District Court for the District of Columbia has repeatedly changed the Local Rules concerning reassignments by the Calendar Committee across the time period of this litigation Bestor hastens to file this brief outlining the situation as best he can.

Rules	***Reassignment***
Aug 01, 1999	Individual judge's decision appealable to the Calendar Committee within 3 days.
May 31, 2002	"As amended, the Rule would make the individual judge's decision final." *Reassignment Order July 15, 2003.* *Plaintiff's Opposition July 17, 2003.*
Sep 01, 2003	Appeal procedure changed back to approaching the Calendar Committee within 3 days. [as best Bestor can reconstruct Rule]
Mar 08, 2004	Website updated, the current Rule is referral to the Calendar Committee but without a time limit specified.

2. Bestor properly acts under the Rule of May 31 2002, and goes so far as to suggest that when challenged the District Court changed the rules [repeatedly, suspecting they were apprehended by a higher judge and forced into the revision of March 8, 2004] which may diminish future claims but certainly not Bestor's. The specter of a District Court modifying Local Rules intending to diminish a particular litigant's appeals before a higher court must be profoundly disturbing. Of course Bestor is absolutely

outraged, claiming that, in light of serial modifications to Local Rules, Roberts' failure to answer Bestor's repeated motions attempting to avert the reassignment certainly appears deliberate – part and parcel with the raging 42:1986 offenses which surround Bestor on an ongoing basis. In fact, '*not answering*' leads Bestor to suspect Roberts was intending to simply dismiss Bestor's Complaint, which could be and probably should be an important part of any 372(c) action, but Bestor's immediate argument is that the District Court's hopscotch with the Rules should considerably broaden his Petition before this Court into issues of basic fairness. Surely changing the Rules midstream must ultimately raise some kind of *Hudson* argument [or *Ham*] in the District of Columbia.

3. The plethora of associated rules and documentation is confusing to the pro se litigant.

> Note 5 at 630 in *Ham v. Smith* 653 F.2d 628 (D.D.C. 1981)
>
> ...While the law clerk's letter cautioned Ham that he should respond to the government's motion promptly, we do not believe it met the standard prescribed by *Hudson*... A general warning does not have the immediacy of a specific warning accompanying motion papers. More important, the law clerk's letter did not explain.... [**in that case** the nature of the summary judgment to Ham, nor did it inform him that a failure to respond to a summary motion might result in the entry of a judgment against him; **here** the repeated Rules changes, either pending or enacted].

Of course the Local Rules of the moment should be included on the written notification of the reassignment, but Bestor claims beyond that at least **his** extenuating circumstances should automatically enlarge the 28 USC 1291 jurisdiction of

the Appeals Court. The essence of the situation is a process question.

Ham cited extensively from *Hudson v. Hardy*, 412 F.2d 1091 (D.C. Cir. 1968),

> We hold that before granting summary judgment against an appellant, the District Court, "as a bare minimum" should give the plaintiff "fair notice of the summary judgment rule." *Id* at 1094.

The district court does notify pro se litigants of the summary judgment issue under *Fox v. Strickland* and specifies a time period in which the litigant can respond. The district court also notifies pro se litigants of reassignments, but without designating any appeal or response process/time period. How much harder would it be to include mention of the appeal process – if one happens to exist at the given moment? Tough to characterize that as burdensome or as an unfunded mandate when the court already routinely sends the letter.

Bestor maintains he – subject to being radiated in the head and spied on instead of being exactly held prisoner – meets the criteria in *Cf. Tarantino v. Eggers*, 380 F.2d 465 (9th Cir. 1967) at 468 showing some consideration for the disadvantaged pro se litigant, which was cited in *Hudson* though it is a case from outside the district.

> ("When a pro se imprisoned plaintiff makes as prompt a response as can reasonably be expected... the strict time limits of [a local rule requiring response within five days] ought not be insisted upon").

Do the jail house defendants even have copies of the local rules? Since the clerk does not give out updated copies – *the Local Rules in the District of Columbia are conceptually web based* - is access to the world wide web now a right *as a matter of law* in the District of Columbia jail? The litigant who does not know *what has proven to be* 'an ephemeral

standard' in the District of Columbia is not going to be there.

4. It is possible others construe a rules issue in Bestor's responding to the reassignment with motions to the district court rather than inquiry at the clerk's counter in the Prettyman Court House or addressing the matter to the reassignment committee,

but Bestor points out both the actual defendants – one seated on the Senate judiciary Committee – and their consul – all real lawyers – failed to raise any rules issue both before the district court and on Appeal though they had plenty of opportunity to do so and have raised other 'targeted' or case specific arguments, and

Bestor suggests their omission illustrates the obscurity and dearth of precedent surrounding the reassignment issue.

5. Bestor wants a new judge to hear the matter and has shown a reasonable basis for his request. The defendants do not want the matter heard at all and previously made that very plain, but never opposed Bestor arguing against the reassignment or sought to support the judge the case was being reassigned to, indeed they – the defendants – in the course of nearly a full year have not made any particular argument opposing or supporting the reassignment.

6. (a) The reassignment was ordered by a committee or group other than either the judge originally assigned to the case at time of filing or the judge to whom the case would be reassigned. Bestor had a motion for Court Orders pending in the Court from time of filing, and Bestor claims some other authority meddling in the case would make him 'bifurcate' his motions.

(b) Though litigating in the district court for over two years, Bestor has yet to argue actually in front of a judge and obviously does not know how to go about getting there. In his first case, *Bestor v. United States* 02cv00279, the docket shows thirty five entries – none of which were sufficient to get Bestor in front of the judge - before his Complaint was

ultimately dismissed on a motion for summary judgment. That was such a circus with surveillance personnel both foreign and domestic Bestor's more recent legal attempts have involved fewer filings by design, yet at the same time that now seems to be held against him. It is certain Kirkland & Ellis and Roy Black or most any other professional law firm would be similarly striving but likely more successful at getting in front of a judge. Bestor therefore claims this reassignment – taking place in the absence of the litigant being able to appear before the new judge – was discriminatory [his certainly being unable to get in front of a judge versus the likelihood a real lawyer would be successful in the same undertaking].

(c) Presumably the committee reassigning the case did not have the authority to grant Bestor's Court Orders [or if they did that was never made clear – Calendar Committee as an appeal venue], and Bestor would argue that as a cause for preventing them from interfering in the matters he brought to the district court.

7. As importantly, Bestor suggests at least in this case, with the one party clearly alleging serious ongoing assault, at some point failing to raise the rules issue became preclusionary.

Given that the same judge had promptly responded to a request of a similar nature in a previous case [Bestor attempting to instigate a reassignment in *Bestor v. Ashley* 02-01538 (motioned 8/28/2002 and denied 9/5/2002) which Bestor cites fully at p. 32 **Appendix 3** of his Petition] this Court must forgive any misunderstanding on the part of the pro se litigant.

8. Again, as Bestor brought an internal security issue to this Court's attention in previous filings [*Bestor v. United States*, 02-1539 Petition for Rehearing under Rule 44. para. 2., page 12] there appears to be a leak today – Bestor filing his Petition here on June 16 with the surveillance

mechanisms sharing awareness [and showing great confidence of prevailing] on June 17 2004. Presumably the Justices met and discussed the matter – *there appears to have been an opportunity involving a conference over a death penalty in Maryland.* While Bestor appreciates the prompt consideration he again claims the leakage *particularly given foreign assailants involvement in these matters* is ultimately diminishing the majesty of the Court.

9. Media sources note Justice Breyer is heading a commission which will examine the federal judiciary, and conceptually – *given a broad situational awareness in Prettyman Courthouse and on Capital Hill* - this might be an excellent 'test case' for that panel to examine.

The problem is that Justice Breyer previously participated in utilizing the neuroprosthetic technology in question to harass Bestor with an induced audio sequence at the time of Bestor's *Petition for Certiorari* on Third Amendment grounds in 2003. Substantially contributing to the carnival atmosphere which surrounds radiating, threatening, and diminishing Bestor, Bestor claims that was knowingly and pointedly done [worse, for the very same reason Asians beyond Japanese join in harassing Bestor – participating represents validation in the group, and collective action dilutes any possible response]. Bestor needed four justices for his case to be heard – clearly Justice Breyer was not going to be one of them but surely he could have confined his labors to the typical conference in which all the justices participate.

The effect was Breyer dismissing Bestor's Third Amendment effort without identifying what the shortcoming was. Undoubtedly a learned man, Bestor wonders if Breyer has ever heard a Third Amendment case – certainly no member of this Court has ever published an opinion on one reported in the Federal Register. Claiming his Petition was in fact a reasonable petition given the length restriction – an

entirely new field of constitutional law in thirty pages or less [in-so-far as extensions are rarely granted] – Bestor points out that Petition should not have been held to the standards of a brief [though it is obviously too late for Bestor to reargue Third Amendment issues now – unless it isn't given Justice Breyer's previous misbehavior]. Very possibly instigated by men who are defendants here or associates of defendants here, Bestor thinks Breyer should excuse himself from further discussion and arguments involving Bestor, but the whole sordid point further convinces Bestor formal open court is the proper venue for these matters.

10. That Local Rules were repeatedly modified suggests indecision among a majority of judges on the District of Columbia circuit. Their ultimate decision was that reassignment definitely is an appealable decision. The possibility Local Rules were modified trying to diminish Bestor's appeal is certainly offensive, but on the other hand 'what the hell.' Thank God this is downtown Washington D.C. where the District Court and the Appeals Court are located in the same building with this Court but a short distance up the hill, and once discovered the situation can be easily corrected,

> "Did you really modify the Local Rules to get around Bestor's litigation?"...[Yes]..."Well that was childish....."

as opposed to the Eastern District of Kentucky or some remote region where such offences may pass as routine. At least somebody on the Appeals Court did make them dance with it, or so it would appear – are they intending to revert to the three day rule when Bestor's litigation is resolved? Do other victimized litigants know that at least for the moment there is an open door 'they could drive a bus through' on the reassignment issue?

End of the day, Bestor claims the controversy including

over Rules [never previously raised], changes to the Rules, and 'Judge Roberts seemingly fueling the fire' is a compelling reason to avert the threatened reassignment as Bestor requested in his *Petition for Certiorari* and previously argued in the district and appeals courts – since July 2003 [now for a year].

After surveying related case law including *Republic Natural Gas Co. v. Oklahoma* 344 U.S. 62, 68 S.Ct. 972, 92 L. ed. 1212 (1948) and *Cohen v. Beneficial Industrial Loan Corp* 337 U.S. 541, 69 S.Ct. 1221, 93 L.ed. 1528 (1949) and observing the uncertainties which plague the federal system, Bestor believes this Court must hear him.

As Justice Powell observed in *Eisen v. Carlisle & Jacquelin* 94 S.Ct. 2140 (1974) at 2149 citing from *Cohen*,

> [the reassignment]was not "tentative, informal, or incomplete" [citation omitted]....Second, the decision did not constitute merely a "step toward final disposition of the merits of the case..." Rather, it concerned a collateral matter that could not be reviewed effectively on appeal from final judgment. The court summarized it's conclusion in this way: "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred while the whole case is adjudicated."

Respectfully submitted,

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